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- Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1947

J. D. SHELLEY, ET AL.,
Petitioners,
v.
LOUIS KRAEMER, ET AL.

ORSEL McGHEE, ET AL.,
Petitioners,
v.
BENJAMIN J. SIPES, ET AL.

JAMES M. HURD, ET AL.,
Petitioners,
v.
FREDERICK E. HODGE, ET AL.

RAPHAEL G. URCIOLO, ET AL.,
Petitioners,
v.
FREDERICK E. HODGE, ET AL.

ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF MISSOURI AND MICHIGAN AND THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Motion for Leave to File Brief and Brief for the American Association for the United Nations as Amicus Curiae

AMERICAN ASSOCIATION FOR THE UNITED NATIONS
as Amicus Curiæ

ALGER HISS,
ASHER BOB LANS,
PHILIP C. JESSUP,
JOSEPH M. PROSKAUER,
MYRES S. McDOUGAL,
VICTOR ELTING,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 72

J. D. SHELLEY, *et al.*,

Petitioners,

v.

LOUIS KRAEMER, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 87.

ORSEL McGHEE, *et al.*,

Petitioners,

v.

BENJAMIN J. SIPES, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 290.

JAMES M. HURD, *et al.*,

Petitioners,

v.

FREDERICK E. HODGE, *et al.*

No. 291.

RAPHAEL G. URCIOLO, *et al.*,

Petitioners,

v.

FREDERICK E. HODGE, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE AMERICAN ASSOCIATION FOR THE UNITED NATIONS AS AMICUS CURIAE

MOTION OF THE AMERICAN ASSOCIATION FOR THE UNITED NATIONS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The American Association for the United Nations respectfully requests this Court for leave to file a brief as *amicus curiae* in the above-captioned cases. We have received the consent of counsel to both petitioners and respondents in Nos. 87, 290, and 291. We have not received any answer to our letters to counsel in No. 72.

The American Association for the United Nations is a nationwide, non-profit organization whose members are vitally interested in adherence by this Government to the provisions and to the spirit of the United Nations Charter.

We have filed this brief because of the extraordinary importance of these cases, particularly with reference to the good faith of this country in observing the intent of the Charter. We believe that, if this Court were to uphold the decrees below enforcing racial restrictive covenants, the guarantees of fundamental human rights contained in the Charter would be vitiated and the international prestige of this country would be greatly impaired. We further believe, although this point will not be elaborated upon in our brief, that these decrees violate the Fifth and Fourteenth Amendments to the Constitution.

On the other hand, reversal of the decrees by this Court would be a magnificent affirmation of the principles to which this country has subscribed in the United Nations Charter and in the United States Constitution. The American Association for the United Nations, therefore, respectfully requests leave to file this brief *amicus curiae*.

BRIEF FOR THE AMERICAN ASSOCIATION FOR THE UNITED NATIONS AS AMICUS CURIAE

Opinions Below

The opinion of the Supreme Court of the State of Missouri in No. 72 (R. 153-159), is reported at 198 S. W. 2d 679. The opinion of the Supreme Court of the State of Michigan in No. 87 (R. 60-69), is reported at 316 Mich. 614. The opinion of the United States Court of Appeals for the District of Columbia in Nos. 290 and 291 (R. 417-432) is reported at 162 F. 2nd 233.

Jurisdiction

This Court's jurisdiction is invoked under 28 U. S. C. §344 (b) and §347 (a).

Question Presented

This brief will be primarily concerned with the question of whether by enforcing racial restrictive covenants (a) so as to preclude petitioners, as negroes, from purchasing and/or occupying realty, (b) so as to preclude other owners of realty from selling or leasing their property to negroes, and (c) so as to eject negroes from property already occupied by them, the Courts below violated Articles 55.(c) and 56 of the United Nations' Charter.

The second question discussed is whether the enforcement of racial restrictive covenants by the Courts below does not constitute improper interference with the public

policy enunciated in Executive Agreements and Declarations, made in the conduct of the foreign relations of the United States.

Summary of Argument

I. Enforcement of racial restrictive covenants is a violation of Article 55(c) and 56 of the treaty known as the United Nations Charter.

a. Interpretation of Articles 55(c) and 56.

b. The obligations of the United States under Articles 55 and and 56 are not qualified by Article 2, Paragraph 7 thereof.

II. As part of the "Supreme Law of the Land", treaties invalidate conflicting provisions of state common law or state statutes.

III. Both state and federal courts are prohibited from taking affirmative action which contravenes the declared foreign policy of the United States of eliminating racial and religious discrimination.

IV. Court orders enforcing racial restrictive covenants constitute governmental action.

I

Enforcement of Racial Restrictive Covenants Is a Violation of Articles 55(c) and 56 of the Treaty Known as the United Nations Charter.

A. Interpretation of Articles 55(c) and 56

Insofar as presently relevant, Article 55(c) of the United Nations Charter provides:

> "• • • the United Nations shall promote • • • uniform respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, and religion."

Article 56 of the Charter embodies the following commitment by the ratifying nations to implement the provisions of Article 55:

> "All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

The United Nations Charter was ratified by the President of the United States, after consent had been given by the Senate pursuant to Article II, Section 2, of the Constitution. 51 *Stat.* 1031. Accordingly, the Charter is a "treaty made • • • under the authority of the United States" and is "the supreme law of the land."

Unless assured equal access to housing and shelter, minority groups are discriminatorially deprived of liberty and property. Hence it seems to us plain that the right to acquire and occupy property without discrimination be-

cause of race is one of the "fundamental freedoms" protected by Articles 55(c) and 56 of the Treaty. In particular, these provisions preclude all courts of the United States from entering any decrees which affirmatively support and enforce racial discrimination in the acquisition and occupancy of property.

(1) Recognizing that a scrupulous respect for international agreements is the bedrock upon which civilized international life is built, this Court has consistently held that such agreements must be broadly construed.

In *Tucker* v. *Alexandroff*, 183 U. S. 424, 437, the court quoted approvingly Chancellor Kent's famous doctrine: "Treaties of every kind are to receive a fair and liberal interpretation according to the intention of the contracting parties, and are to be kept with the most scrupulous good faith" (1 Kent, *Commentaries*, p. 174).

In *Factor* v. *Laubenheimer*, 290 U. S. 276, 293, this Court held:

> "In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements * * *. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, a more liberal construction is to be preferred."

This doctrine is equally applicable in the construction of treaties dealing with questions which, under our Federal system, might otherwise be confided to the jurisdiction of

the separate states.[1] For, as stated by Mr. Justice Stone in *Nielsen* v. *Johnson*, 279 U. S. 47, 52:

> "* * * as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation * * *."

See, also, *Valentine, et al.* v. *Neidecker*, 299 U. S. 5; *Jordan* v. *Tashiro*, 278 U. S. 123, 127-130.

(2) The decision of the Supreme Court of Michigan in No. 87, *McGhee & McGhee* v. *Sipes, et al.* (R. 60-69), asserted that the provisions of Articles 55(c) and 56 of the Charter are merely the statement of "an objective devoutly to be desired by all well-thinking people."

This interpretation is an unreasonable construction of these Articles. If the draftsmen of the Charter had possessed the limited intention ascribed to them by the Supreme Court of Michigan, they need only have inserted therein a general declaration that the promotion of human rights was one of the objectives of the organization.

Indeed, the first draft of the United Nations Charter—the so-called "The Dumbarton Oaks Proposals"—contained only the most nominal reference to the protection

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[1] This statement is not to be taken as a concession that, apart from the existence of relevant international agreements, the determination of whether or not racial restrictive covenants should be judicially enforced is to be made solely in the light of the public policy of the several states. In our opinion, enforcement of such covenants is prohibited by the Fourteenth Amendment to the United States Constitution, for the reasons persuasively stated in the *amicus* briefs filed herein by the Department of Justice and by the American Civil Liberties Union.

of human rights and did not place any obligation upon the signatory powers for their protection. (See Stettinius, *Charter of the United Nations—Report to the President on the Results of the San Francisco Conference*, Dept. of State Publication 2349, Conference Ser. 71, pp. 25-27.)

However, at the outset of the San Francisco Conference, the United States Delegation proposed that the agreement be expanded to include guarantees of the fundamental freedoms "for all, without distinction as to race, sex, language or religion". The present language of Article 55(c) was drafted principally by the United States Delegation. Former Secretary of State Stettinius, in his Report to the President on the San Francisco Conference, stressed the significance of the word "observance" in the final version of that Article. *Ibid.*

The record of the San Francisco Conference further indicates that Article 56 was inserted in the Charter so as to make the pledge of observance of human rights contained in 55(c) a commitment binding upon the member nations.[2] As stated in a Committee report, the obligation imposed by Article 56 was three-fold: "To take separate action to implement the purposes of Article 55, to take joint action, and to cooperate with the Organization." See

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[2] It is well established that the record of negotiations preceding the preparation of a Treaty is germane in construing the provisions of that Agreement. See *Terrace, et al.* v. *Thompson*, 263 U. S. 197, 223-4; *U. S. Shoe Machinery Company* v. *Duplessis Shoe Machinery Company*, 155 Fed. 842, 848 (C. C. A. 1st); *Lighthouses* case, Per. Ct. Int. Jus., Judgment, March 17, 1934, Ser. A/B, No. 62, p. 13, 3 Hudson, *World Court Reports* (1938) 368, 378; Lauterpacht, *Some Observations on Preparatory Work in the Interpretation of Treaties* (1935), 48 Harv. L. Rev. 549, 552, 571-3, 591; 2 Hyde, *International Law* (1945 Ed.) pp. 1468-70; McNair, *Law of Treaties* (1938) 185.

Goodrich and Hambro, *Charter of the United Nations, Commentary and Documents* (1946), p. 192.[3]

Secretary Stettinius has stated that Article 56 was intended to constitute a pledge by the signatory powers to protect human rights, "to their own best ability, in their own way, and in accordance with their own political and economic institutions and processes" Stettinius, *op. cit. supra*, p. 115.

In the federal structure of the United States, it is the especial responsibility of this Court to take appropriate action to protect, as against discrimination by local governmental bodies, including the state courts, those human rights to whose enforcement the United States Government is pledged by solemn international agreement.

(3) As previously pointed out, Article 55(c) was introduced into the Treaty at the insistence of the United States Delegation to the San Francisco Conference. It is therefore appropriate that consideration should be given, in interpreting this Article, to the traditional American definitions of fundamental human rights.

The right to use and occupy real property free of racial discrimination is one of those fundamental freedoms.

Congressional acceptance of this tenet is indicated by the Civil Rights Act of 1866, reading:

> "All citizens of the United States shall have the same right in every State and Territory as is en-

[3] See also United Nations Conference on International Organization, San Francisco 1945, Volume X, pp. 139, 140, and 160; Document 699, 11/3/40, May 30, 1945, and Document 747, 11/3/46, June 2, 1945.

joyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property." 8 U. S. C. §42.

In a series of decisions dating back to the 1870s, this Court has made it plain that racial inhibitions on the opportunity to occupy realty are prohibited by the Fourteenth Amendment. Thus in the *Civil Rights Cases*, it was held that the right "to hold property, to buy and to sell" without discrimination as to race could not be impaired by legislative, judicial or executive action by the states. 109 U. S. 3, 17.

In *Yick Wo* v. *Hopkins*, 118 U. S. 356,—the first case in which state action was invalidated under the Fourteenth Amendment—the unanimous Court barred enforcement of a municipal ordinance, which, despite its impartial language, had been applied so as to discriminate against the utilization of certain types of buildings by Orientals.

The thread of these and similar cases was firmly woven into the law of the land in *Buchanan* v. *Warley*, 245 U. S. 60, where it was stated that the right to buy, use and dispose of property on equal terms was a fundamental right of citizenship. In effectuation of this principal, it was held that a municipality could not constitutionally regulate the purchase and sale of property for occupancy, in terms of the color of the proposed occupant. See, also, *Harmon* v. *Tyler*, 273 U. S. 668; *City of Richmond* v. *Deans*, 281 U. S. 704.

(The statement of the majority in No. 290, *Hurd* v. *Hodge*, 162 Fed. (2d) 233 (App. D. C.), that the decision of this Court in *Corrigan* v. *Buckley*, 271 U. S. 323, insulates racial restrictive covenants against invalidation under the

Fourteenth Amendment is clearly erroneous. As pointed out in the dissenting opinion of Mr. Justice Edgerton in *Hurd v. Hodge*, all that the court held in *Corrigan* was that such covenants are not void *per se* under the Constitution and the Civil Rights Act. The contention that the Constitution and the Civil Rights Act prohibited enforcement of such covenants was not before this Court in that case.)

(4) Persuasive support for the conclusion that enforcement of racial restrictive covenants is prohibited by the United Nations Charter is provided by the views of authoritative commentators.

Thus, Edward Stettinius, Chief of the United States Delegation to the San Francisco Conference, has declared that the right to purchase and use property without discrimination because of race is one of the freedoms guaranteed by these sections. See Stettinius, *Human Rights in the United Nations Charter* (1946) 243 Annals of the American Academy of Political and Social Science, pp. 1-3.

Similarly, Article 17 of the Statement of Essential Human Rights prepared by the American Law Institute declares that

> "Everyone has the right to protection against arbitrary discrimination in the provisions and application of the law because of race, religion, sex or any other reason."[4]

This interpretation is further bolstered by the decision of the High Court of Ontario in *Re Drummond Wren* (1945), 4 Dominion Law Reports 674, (1945) Ontario Reports 778.

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[4] Article 14 of the Statement includes among the fundamental freedoms, the right of all individuals to "adequate housing".

This case arose upon an application, under a special statutory proceeding available in Ontario, to have the following restrictive covenant declared invalid: "Land not to be sold to Jews or persons of objectionable nationality."

The Ontario High Court found that the quoted covenant was invalid, since violative of the United Nations Charter and also of the public policy of the province. The relevant portion of the Court's decision is as follows:

> "First and of profound significance is the recent San Francisco Charter, to which Canada was a signatory, and which the Dominion Parliament has now ratified. • • •
>
> "Under articles 1 and 55 of this Charter, Canada is pledged to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.' • • •
>
> "Ontario and Canada too, may well be termed a province, and a country, of minorities in regard to the religious and ethnic groups which live therein. It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity. The common law courts have, by their actions over the years, obviated the need for rigid constitutional guarantees in our policy by their wise use of the doctrine of public policy as an active agent in the promotion of the public weal. While courts and eminent judges have, in view of the powers of our legislatures, warned against inventing new heads of public policy, I do not conceive that I would be breaking new ground were I to hold the restrictive covenant impugned in this proceeding to be void as against public policy. Rather would I be applying

well-recognized principles of public policy to a set of facts requiring their invocation in the interest of the public good. * * *

"My conclusion therefore is that the covenant is void because offensive to the public policy of this jurisdiction. *This conclusion is reinforced, if reinforcement is necessary, by the wide official acceptance of international policies and declarations* frowning on the type of discrimination which the covenant would seem to perpetuate" [(1945) Ontario Reports at 781-784]. (Italics supplied.)

B. The Obligations of the United States Under Articles 55 and 56 of the Charter Are Not Qualified by Article 2, Paragraph 7 Thereof

Article 2, paragraph 7 of the United Nations Charter provides:

"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter. * * *".

It is plain that this language is a limitation on the United Nations Organization itself and that it does not in any way modify the obligations assumed under the Charter by the several member States.

Article 56 embodies a specific commitment by all signatory nations to carry out the purposes of Article 55. It is arguable that sub-sections (a) and (b) of Article 55—pledging the promotion of "higher standards of living" and the solution of various international problems—are too vague and all embracing to compel specific action under

Article 56, or to affect the decisions of national tribunals. However, the more explicit language of sub-section (c) of Article 56 is a mandate to this Court (and the courts of all member nations) to protect all generally accepted "human rights and fundamental freedoms."

Article 56 imposes upon the United States the legal obligation to enforce the objectives stated in Article 55, in accordance with its "own political and economic institutions and processes." Stettinius, *op. cit. supra*, p. 115. At the very least, the courts of the United States are obligated to take no action which violates those "human rights and fundamental freedoms", which as demonstrated above, are protected under Article 55(c), against discrimination because of "race, sex, language and religion".

The argument of the preceding paragraphs is not intended to be a concession that the question of whether or not Negroes are protected against discrimination in the use of land is "within the domestic jurisdiction", as that phrase is used in Article 2, paragraph 7 of the Charter. A field of policy ceases to be essentially "within the domestic jurisdiction" of a state, if "the right of the state to use its discretion is * * * restricted by obligations which it may have undertaken toward other states." *Tunis-Morocco Nationalities Case*, 1 World Court Reports 156.

In so far as the United States has assumed obligations, under Articles 55(c) and 56 (and also under the Executive Agreements and Declarations referred to in Point III hereof), to protect "human rights and fundamental freedoms", these matters cease to remain "essentially within the domestic jurisdiction" of the United States.

II

As Part of the "Supreme Law of the Land", Treaties Invalidate Conflicting Provisions of State Common Law or State Statutes.

In No. 87, *McGhee & McGhee* v. *Sipes, et al.*, The Michigan Supreme Court implied that the provisions of a Treaty are not "applicable to the contractual rights between citizens when a determination of these rights is sought in a State court" (R. 67). This doctrine is contrary to the express language of the United States Constitution and to a half score of decisions of this Court, which make the provisions of treaties binding in all law suits brought in any court in the United States.

(1) Article VI, Section 2, of the Federal Constitution states:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

It has been held that Treaties (and other International Agreements) are superior to state law in all situations, which are "proper subject of negotiation between our Government and the governments of other nations • • •" *Geofroy* v. *Riggs*, 133 U. S. 258, 266. See also *Santovincenzo* v. *Egan*, 284 U. S. 30, 40.

As was recently stated by Professor Hyde, "the advancement of interests acknowledged to be of international

concern" has recently impelled the United States (and other nations) to place treaty "restrictions upon the conduct of individuals * * * in relation to activities which would appear normally to lack international significance * * *." 2 Hyde, *International Law* (1945 ed.), 1398.[5] The foreign relations record, developed at length in Point III hereof, indicates beyond possibility of quibble that protection of human rights has in recent years become one of the important fields of negotiation in foreign relations.[5]

Moreover, it is plain that the Tenth Amendment does not in anywise limit the Treaty-making power of the Federal Government, even if used to accomplish results which Congress might be impotent to achieve directly. *Missouri* v. *Holland*, 252 U. S. 416, 432-3;[6] *University of Illinois* v. *United States*, 289 U. S. 48.

(2) In numerous cases, Treaties concluded by the United States and dealing with property or contract rights,

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[5] In any case the precedents of 150 years impel this Court to hold that the determination of whether a particular subject is within the sphere of international agreement is a political question—where the decision of the Executive and Senate is final. "What the President and Senate have deemed a proper subject of international agreement has never been otherwise regarded by the Supreme Court." 2 Hyde, *International Law* (1945 ed.) 1400. Cf. *Doe* v. *Braden*, 16 How. 635, 657; *Terlinden* v. *Ames*, 184 U. S. 270, 288; *Anchor Line* v. *Aldridge*, 280 Fed. 870, 876.

[6] As Judge Holmes stated in that case, Article 6, Section 2, of the Constitution proclaims as the primary law of the land, all treaties made "under the authority of the United States". See, also, the opinion of Mr. Justice White, in *Downes* v. *Bidwell*, 182 U. S. 244, 317; *Baldwin* v. *Franks*, 120 U. S. 678, 682; cf. Views of Thomas Jefferson, *American State Papers, Foreign Relations of the United States*, Vol. 1, p. 252; Comment attributed by Mr. Justice Story to Chief Justice Marshall, 5 Moore, *Digest of International Law*, 173.

ordinarily subject to control by the States, have been held to overrule contrary State laws.

Thus, in 1796, this Court held in *Ware* v. *Hylton*, 3 Dall. 199, that the 1783 treaty between the United States and Great Britain, which gave British creditors the right to recover debts contracted here before the treaty was ratified, notwithstanding that the debts may have been paid into the state public treasuries under state statutes, was "sufficient to nullify the law of Virginia, and the payment under it."

See also:

Chirac v. *Chirac*, 2 Wheat. 259;
Hughes v. *Edwards*, 9 Id. 489;
Carneal v. *Bank*, 10 Id. 181;
Hauenstein v. *Lynham*, 100 U. S. 483;
Geofroy v. *Riggs*, 133 U. S. 258;
Todok v. *Union State Bank*, 281 U. S. 449;
Nielsen v. *Johnson*, 279 U. S. 47;
Clark v. *Allen*, 67 Sup. Ct. 1431.

It is also clearly established that the relevant provisions of treaties are binding and final upon individual citizens, in all actions brought upon private contracts.

Kennett v. *Chambers*, 14 How. 38, was an application for specific performance of a contract to supply arms to Texan rebels against Mexico, made at a time when this country still recognized Mexican sovereignty over Texas. This Court held that no Tribunal in the United States could enforce a contract, whose terms were contrary to the national policy, as embodied in treaties with Mexico.

In *Gandolfo* v. *Hartman*, 49 Fed. 181 (C. C. S. D., Calif.), the Circuit Court refused to enforce a private covenant

not to rent property to Chinese persons, on the ground that the equal treatment provisions in the Chinese-American Treaty of 1880 made such provisions void. The court stated that when the legislatures were forbidden to discriminate against the Chinese by this treaty, it would be unthinkable to permit individual citizens to discriminate by contract enforcible in the courts.

(3) Article VI, Section 2 of the Constitution makes treaties (and other international agreements) superior to the decision or common law of the States.

For it can scarcely be doubted that the reference in that Section to the "Laws of any State" subsumes the common law of the various states as well as their statutes.

As was stated in *Erie Railway* v. *Tompkins*, 304 U. S. 64, 78, the law of a State may equally well be declared "by its legislature in a statute or by its highest court in decision * * *."[1]

This court has always held that treaties were superior to and invalidated inconsistent doctrines of State common law. Thus, in *Orr* v. *Hodgson*, 4 Wheat. 453, a treaty stipulation was held to overrule the common law of the state that intestate real property of an alien escheated to the sovereign.

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[1] In determining the extent of national responsibility to make reparations for the breach of an international obligation, it has always been the rule that the act of the highest court in a country constituted the act of that country's government. See statement of Secretary of State Kellogg, 5 Hackworth, *Digest of International Law*, 589; Research on International Law, *The Law of Responsibility* (Reprinted), 24 American Journal of International Law, Spec. Supp. (1929) 166, 178; 2 Hyde, *International Law* (1945 ed.) 931-34.

A similar decision was rendered in *Hauenstein* v. *Lynham*, 100 U. S. 483. While various provisions of the Virginia statutes were referred to in that case, it is clear that the decision of the Court of Appeals of Virginia, reversed therein by this Court, was predicated entirely upon the common law of the state. 100 U. S. 483, 484-5.

The same point was made in the following dictum of Mr. Justice Taney in *Kennett* v. *Chambers*, 14 How. 38, 51:

> "* * * certainly no law of Texas then or now in force could * * * compel a court of the United States to support a contract, no matter where made or where to be executed, if that contract * * * was in conflict with subsisting treaties with a foreign nation."

The issue was most squarely raised as an aftermath of the so-called "Litvinoff Assignment" of 1933, whereby the Soviet Government transferred to the United States all its property claims against American nationals. Thereafter the United States claimed possession of all of the assets in New York of certain Russian companies, whose property had been expropriated by Russian Government decrees.

The New York Court of Appeals, the highest court in the State, held that such expropriatory decrees could not be recognized in New York, because violative of the public policy of the forum (*United States* v. *Pink*, 284 N. Y. 555, 32 N. E. (2d) 552). This Court reversed the decision of the Court of Appeals on the ground that the public policy of New York could not be enforced in the fact of the contrary provisions of the Litvinoff Assignment, stating in part:

> "And the policies of the States become wholly irrelevant to judicial inquiry when the United States,

> acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts." (*United States* v. *Pink*, 315 U. S. 203, 233-4.)

A similar conflict between the public policy of New York and the provisions of the Litvinoff Assignment was presented in *United States* v. *Belmont*, 301 U. S. 324, where this Court stated in part:

> "Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning • • •. Within the field of its powers, whatever the United States rightfully undertakes it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power." (301 U. S. 324, 331-2.)[8]

The Litvinoff Assignment was an executive agreement, which did not require and had not secured the consent of the Senate. (See *United States* v. *Pink*, 315 U. S. 203, 229.) If the pre-existing common law of a state cannot be enforced by the courts of that state against the contrary provisions of an executive agreement, *a fortiori* that common law cannot be enforced against the contrary provisions of a treaty.

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[8] This Court's decision in *U. S.* v. *Belmont*, *supra*, reversed the decision of the Circuit Court of Appeals for the Second Circuit, which, however, was admittedly based upon the common law of New York.

III

Both State and Federal Courts are Prohibited from Taking Affirmative Action Which Contravenes the Declared Foreign Policy of the United States of Eliminating Racial and Religious Discrimination.

Even conceding, *arguendo*, that Articles 55 (c) and 56 of the United Nations Charter are not self-executing, they nevertheless constitute an authoritative declaration of the foreign policy of the United States as committing this Government to the elimination of racial discrimination.

This policy has been reiterated in recent Executive Agreements and Declarations. Thus, one of the resolutions adopted on March 7, 1945, at the Chapultepec Inter-American Conference, committed the United States (as well as all other signatory powers) to "prevent * * * all acts which may provoke discrimination among individuals because of race or religion".[9]

Similarly Article 6 (c) of the Charter, ratified by the United States, establishing the Nuremberg International Militray Tribunal[10] stated that prosecutions on racial or religious grounds "whether or not in violation of the dominant law of the country where perpetrated," constituted a punishable international crime.

The Treaties of Peace between the Allied Powers (including the United States) and Italy, Roumania, Bulgaria and Hungary, all contain provisions whereby the latter na-

[9] Regulation XLI, reprinted in Report of the Delegation of the United States of America to the Inter-American Conference on Problems of War and Peace, Mexico City, Mexico, Department of State Publication 2497, pp. 39, 109.

tions agree not to impose any restrictions on their nationals for religious or racial reasons.[11]

Section III A 4 of the Executive Agreement between the United States, Russia, France and Great Britain, known as the Potsdam Declaration, provides for the abolition of all Nazi laws establishing racial or religious discrimination, "whether legal, administrative or otherwise."[12]

This Court may take judicial notice that in each of these instances the provisions for the protection of human rights were adopted primarily upon the insistence of the United States Government.

Former Under-Secretary of State Acheson has pointed out that "* * * discrimination against minority groups in this country has an adverse effect upon our relations with foreign countries." *Report of the President's Committee on Civil Rights* (1947), 146.

By treaty, executive agreement and declaration, the President and the Senate have committed this country to the firm policy of eliminating racial and religious discrimination, and, most particularly of eliminating governmental procedures which protect such discrimination. It is self-evident that enforcement by a governmental agency—a state court—of a covenant which denies to American citi-

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[10] Trial of War Criminals, Department of State Publication No. 2420, pp. 13, 16.

[11] See Department of State Publication 2743, European Series 21, Article 15 of the Italian Treaty; Article 2 of the Bulgarian, Hungarian and Roumanian Treaties.

[12] 13 Department of State Bulletin (No. 319—August 5, 1945) pp. 153-55.

ens because of color the right to occupy property cannot but embarrass the conduct of our foreign relations.[13]

Recent decisions by this Court have made it plain that the highest courts of the several states cannot, under the guise of declaring the public policy of their jurisdictions, interfere with contrary policy enunciated by the Federal Government, in its control of our foreign relations.

Thus in *Belmont* v. *United States*, 301 U. S. 324 and *United States* v. *Pink*, 315 U. S. 203, this Court reversed decisions based upon the admitted public policy of the State of New York as applied to certain types of extra-territorial judicial decrees, because of inconsistency between this policy and the inferences deduced by the Court from an Executive Agreement made by the President on his own responsibility.

In the *Belmont* case, *supra*, Mr. Justice Sutherland said:

> "Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning. Mr. Madison, in the Virginia Convention, said that if a treaty does not supersede existing state laws, as far as they

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[13] Breach of the obligations imposed upon this Government by Articles 55 (c) and 56 of the United Nations Charter and of the implied obligations imposed by the above stated Agreements would constitute an International Delinquency by the United States. See *Chorzow Factory Case*, Per. Ct. Int. Jus., Judgment, July 26, 1927, ser. a. No. 9, p. 21, 1 Hudson, World Court Reports (1934) 589, 602; *The Greco-Bulgarian Communities Case*, Per. Ct. Int. Jus., Advisory Opinion, July 31, 1930, ser. b. No. 17, p. 32, 2 Hudson, World Court Reports (1935) 640, 661; *The Free Zone Case*, Per. Ct. Int. Jus., Order, December 6, 1930, ser. a. No. 24, p. 12, 2 Hudson World Court Reports (1935) 448, 490.

> contravene its operation, the treaty would be ineffective. 'To counteract it by the supremacy of the state laws, would bring on the Union the just charge of national perfidy, and involve us in war.' And while this rule in respect of treaties is established by the express language of cl. 2, Art. 6, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. * * * In respect of all international negotiations and compacts and in *respect of our foreign relations generally, state lines disappear.*" (301 U. S. 324, 331.) (Italics supplied.)

More recently, in *Bernstein* v. *Van Heyghen Frères Société Anonyme,* 163 Fed. (2d) 246 (C. C. A. 2d), Judge Learned Hand has intimated that a clear declaration of Federal policy as to the invalidity of racial confiscatory decrees enacted by the former Nazi Government of Germany would necessarily overrule conflicting provisions of the statutes and common law of the states and determine the title to property located therein. This is the inevitable conclusion to be drawn from the decisions of this Court in which it has been held that as "necessary concomitants of nationality", the Federal Government has plenary powers in the field of foreign relatons.

See:

United States v. *Curtiss-Wright Export Corporation,* 299 U. S. 304, 318;

Jones v. *United States,* 137 U. S. 202, 212;

Fong Yue Ting v. *United States,* 149 U. S. 698, 705.

It follows that this Court should reverse the decisions of the Supreme Courts of Missouri and Michigan in Nos. 72 and 87, as contrary to the express and binding foreign policy of the United States.

For the same reason, the decision of the Court of Appeals for the District of Columbia in Nos. 290 and 291 must be reversed. This Court has no occasion to concern itself with speculation as to the public policy of the State of Maryland at the end of the Eighteenth Century, when the District Cession Act was passed. For the public policy of the District is necessarily subject to constant modification, in accordance with relevant Federal action. It would be absurd to permit "local governmental bodies" in the Capital of the United States to create and enforce racial discriminations, which are contrary to the International policy of this government.

IV

Court Orders Enforcing Racial Restrictive Covenants Constitute Governmental Action.

The argument that the decree enforcing a racial restrictive covenant merely effectuates a contract between private parties and does not constitute "governmental" action cannot withstand analysis.

Judges cannot be reduced to the status of county clerks or land registrars the courts have always declined to enforce those contracts which they felt were "injurious to the interests of the public" and, therefore, "void on the grounds of public policy".[14]

In other words, implicit in every decision to enforce a contract is the premise that performance of that contract is not contrary to the public welfare. The frequently inarticulate premise of the law courts has been stated with great explicitness in the decisions of courts in equity, determining whether or not to enforce a formally valid contract by injunction or specific performance.[15]

The historical development of the law governing the enforcibility of restrictive covenants on the use and alien-

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[14] *Horner* v. *Graves*, 7 Bing 735, 743; see also 5 Williston, *Contracts* (1937 Ed.), pp. 4554-4568; Winfield, *Public Policy in the English Common Law* (1928), 42 Harv. L. Rev. 76.

[15] "In equity, * * * there must be the further inquiry whether it is against public policy to have the contract performed." 5 Williston, *Contracts* (1937 Ed.), n. 4 at p. 4001; see also, *Seattle Electric Co.* v. *Snoqualmie Falls Power Company*, 40 Wash. 380, 82 P. 713; *Cities Service Oil Co.* v. *Kuchuck*, 267 N. W. 322 (Wis.); *Rice* v. *D'Arville*, 162 Mass. 559, 39 N. E. 180; *Warner Brothers Pictures* v. *Nelson* (1937), 1 K. B. 209.

ability of land has always been characterized by constant reference to public policy. The running of the burden of restrictive agreements on land against subsequent purchasers and assignees was an invention of courts of equity in the middle of the nineteenth century. See *Tulk* v. *Moxhay*, 2 Phillips 774 (English Chancery, 1848). The judicial legislation embodied in this and similar decisions necessarily involved a conclusion that the objective obtained by the enforcement of restrictive covenants was of greater communal importance than preservation of the traditional policy of permitting owners freely to use their property in any lawful manner.

After the courts swept aside the doctrinal cobwebs, that restrictive covenants were enforcible only if they "touched and concerned" and/or if there was "privity of estate", they enunciated even more clearly the requirement that such restrictions could be enforced only if they promoted the wisest and best use of land. As stated by Justice Holmes in *Norcross* v. *James*:[16] "Equity will no more enforce every restriction that can be devised, than the common law will recognize as creating an easement, every grant purporting to limit the use of land in favor of other land." The courts have been particularly cautious in enforcing covenants restraining alienation, because of the desire to insure maximum freedom of access to basic natural resources.

If further proof is required that the determination of whether or not to enforce restrictive covenants against

[16] 140 Mass. 188, 192; 2 N. E. 946. For an instructive general discussion of the law of restrictive covenants, see Clark, *Covenants and Other Interests Running with the Land* (2d Ed. 1947).

land is hedged about from start to finish with considerations of public policy, it is furnished in the decisions of the courts below.

Thus, the opinion of the Court of Appeals for the District of Columbia (in Nos. 290 and 291) expressly referred to the considerations of community policy, which, it was felt, made it desirable that the restrictions should be enforced.[17] Similarly, the Supreme Court of Michigan (in No. 87) and the Supreme Court of Missouri (in No. 72) expatiated upon the social benefits considered likely to result from maintenance of racial restrictions.[18]

The judge who enjoins the sale of realty or decrees the ejection of persons from their property pursuant to a racial covenant is performing a governmental function—as is revealed by an analysis of the consequences of such a decision.

If a land owner refuses to sell his land to a Negro, because of the prospective purchaser's color, it may be assumed that no question of constitutional law or treaty supremacy arises. Moreover, no question of affirmative governmental action is presented. Cf. *Civil Rights Cases*, 109 U. S. 3.

However, when one of the parties to a restrictive agreement or his assign sells land to a Negro (or an Indian, Chinese, Jew or Catholic) in violation of an agreement, and another party resorts to the courts in an attempt to prevent such violation—the agreement loses its essentially private character.

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[17] See R. 417-418.

[18] See R. 65-66 and R. 156-157, respectively.

Whether a court's jurisdiction is invoked by a public official or a private citizen, the judiciary is nonetheless an instrument of government. The decree of a court enjoining a Negro purchaser from occupying property, or its order ejecting him from property, constitutes more than ministerial action and carries with it the threat of enforcement by governmental sanction.

A sale made after the rendition of such a decree subjects the party against whom it has been directed to contempt proceedings—for defying the machinery of government. Moreover, in a case such as *Hurd* v. *Hodge* (No. 290), where the court orders the purchasers to evacuate their property, refusal by them to do so could result in their forcible dispossession by the local marshals.

Surely, it is immaterial that the courts below grounded their decisions upon their conceptions of the public policy of their jurisdictions. For no court in the United States has the right to enforce contracts which are palpably contrary to the terms and the spirit of International agreements entered into by the Federal Government.

It is plain that a state law or municipal ordinance establishing a racial restrictive zoning system would be illegal under Articles 55 (c) and 56 of the United Nations Charter, under the international Agreements referred to in Point III hereof, and under the Fourteenth Amendment. See *Gandolfo* v. *Hartman*, 49 Fed. 181 (C. C. S. D., Cal.); *Buchanan* v. *Warley*, 245 U. S. 60.

This Court cannot permit the judicial machinery of the United States to be used to protect a private ghetto system, which the state and municipalities (and even Congress) would be powerless to establish. For this Court has

repeatedly held that judicial action is equally the action of government and subject to constitutional and other limitations, whether it is based upon policy decisions implicit in the common law or policy decisions made explicit in statutes.

Thus, *Marsh* v. *Alabama*, 326 U. S. 501 involved an attempt by the State of Alabama to enforce its non-discriminatory trespass statute, at the instigation of a corporate property owner, who had barred a member of Jehovah's Witnesses from proselytizing on its premises. The state sought to justify its action, against invalidation for repugnance to the Fourteenth Amendment, on the theory that it was merely protecting a private land owner. This Court held that since the state, if it had been the owner of the property, could not constitutionally have restricted freedom of speech in this manner, it could not utilize its judicial power to effectuate a similar restriction imposed by a private owner.

See also:

Civil Rights Cases, 109 U. S. 3, 11, 17;
Ex Parte Virginia, 100 U. S. 339;
Steele v. *L. & N. Ry.*, 323 U. S. 192;
Cantwell v. *Connecticut*, 319 U. S. 296;
A. F. of L. v. *Swing*, 312 U. S. 321.

The decisions cited above have uniformly held that judicial rules of substantive law, including equity, are invalid when they conflict with the requirements of the Fourteenth Amendment.

By parallel reasoning, Article 6, Section 2 of the Constitution invalidates judicial rules of substantive law, in-

cluding equity, whether enunciated by the state or federal courts, when contrary to the provisions of Treaties or of Executive Agreements, made in the conduct of the Foreign Relations of the United States.

Through appropriate international agreements, the United States Government has condemned tribalistic theories of racial supremacy. The United States Government has firmly committed itself to the elimination of racial and religious discriminations affecting life, liberty and property. Hence the anachronistic decisions of the courts below should be reversed.

CONCLUSION

The decisions of the courts below should be reversed.

Respectfully submitted,

THE AMERICAN ASSOCIATION
FOR THE UNITED NATIONS,
Amicus Curiae,

ALGER HISS,
ASHER BOB LANS,
PHILIP C. JESSUP,
JOSEPH M. PROSKAUER,
MYRES S. MCDOUGAL,
VICTOR ELTING,
Of Counsel.